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No. 83-727

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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LAMAR ALEXANDER,
GOVERNOR OF THE STATE OF TENNESSEE, *et al.*,
*Petitioners,*

v.

ROSIER JENNINGS, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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## BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

### INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and in-

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[1] Their consents have been filed with the Clerk of the Court.

dustry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (herein "Section 504" or "the Act"). Accordingly, EEAC's members have a direct interest in the issue presented in this case; *i.e.*, whether a "disparate impact" or "effects" test is appropriate to determine a violation of Section 504 of the Act, or whether a showing of intentional discrimination is necessary to establish a violation.

Because of its interest in issues arising out of Section 504, EEAC has filed amicus curiae briefs with this Court in several cases construing that statute. *See, Consolidated Rail Corporation v. Darrone*, 104 S. Ct. 1248 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); and *University of Texas v. Camenisch*, 451 U.S. 390 (1981). EEAC also has filed briefs with the Court in cases involving Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d, *et seq.*), and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1988). *See, Grove City College v. Bell*, 104 S. Ct. 1211 (1984); *Guardians Association v. Civil Service Commission*, 103 S. Ct. 3221 (1983); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). The courts generally have recognized that the language of Section 504 and Title IX was patterned after Title VI.[2]

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[2] EEAC has participated further before the Court in cases construing the application of the adverse impact standard of liability in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* See Int'l Bro. of Teamsters v. United

## STATEMENT OF THE CASE

In this case, the Tennessee Medicaid Program determined that it no longer could afford to pay for the existing array of medicaid benefits. Because of severe budgetary constraints, the State determined it was necessary to cut back on the level of a number of existing benefits.[3] At issue here is the State's decision to reduce the number of inpatient hospital days provided by Medicaid in a fiscal year from twenty to fourteen days. Respondents brought suit seeking to enjoin the proposed reduction. One of the theories of liability was that the proposed changes would violate Section 504 of the Rehabilitation Act.

Respondents primary argument is that Section 504 of the Act proscribes conduct that has an adverse impact (or effect) on the handicapped and that the decrease in hospital days would have an impermissible effect on handicapped Medicaid recipients. The district court below, however, held that the Respondents failed to establish that the limitation of fourteen days would in fact have a discriminatory impact upon handicapped Medicaid recipients. See *Jennings v. Alexander*, 518 F. Supp. 877, 881 (N.D. Tenn. 1981).[4] Moreover, the district court

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States, 431 U.S. 324 (1977); Connecticut v. Teal, 457 U.S. 440 (1982). Finally, EEAC filed a brief as amicus curiae in General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982), a case holding that a showing of an intentional violation is necessary to establish a violation of 42 U.S.C. § 1981.

[3] The budgetary reasons for the cutback are explained more fully in the brief of the State of Tennessee.

[4] The amicus, EEAC, concurs with the State that the statistical evidence presented below by the Respondents does not establish that the proposed cuts would have an adverse impact upon handicapped recipients. Our primary focus, however, is on the broader question of whether the adverse impact theory is applicable to Section 504 of the Act. We rely, therefore, on the State to argue that the Respondents' statistical evidence does not show that these particular cutbacks would have an adverse impact.

found that even if the evidence could be construed to demonstrate a disparate impact upon the handicapped as a separate group, the impact was not the type that Section 504 was intended to proscribe. *Id.* The court stated that "[b]oth handicapped and nonhandicapped Medicaid recipients will have identical services available for their use, subject to the same durational limitation." 518 F. Supp. 883. In the district court's view, while Section 504 may require the State to give handicapped individuals equal access to Medicaid benefits, neither the section nor the applicable regulations mandate equal results for the handicapped and nonhandicapped. 518 F. Supp. at 883, 884.[6] And as the court further noted, "the same durational limit works without regard to any particular handicapping condition and regardless of the particular cause of hospitalization." 518 F. Supp. at 885.

Because the coverage would be terminated whether or not the recipient was handicapped, the court could find no discrimination by reason of handicap. Thus, in the district court's view, "so long as a service is offered in equal quality, scope and duration to both handicapped and nonhandicapped recipients, and handicapped recipients are actually afforded equal access to that service, the mandates of § 504 have been satisfied." *Id.* at 886.

The Sixth Circuit, in a 2-1 decision, reversed the decision of the district court. Thus, with little discussion, the appellate court stated that the effects test is a suffi-

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[6] The district court's decision, having found no adverse impact covered by Section 504, did not discuss at any length the underlying issue of whether an adverse impact claim is cognizable under the Act. The court stated merely:

> While agreeing that a disparate impact test is the appropriate standard to apply in a § 504 case, the court holds that the adverse impact arguably shown in this case does not amount to discrimination under § 504.

518 F. Supp. at 885.

cient basis upon which to base a violation of Section 504. *Jennings v. Alexander*, 715 F.2d 1036, 1041-42 (6th Cir. 1983), *pet. for cert. granted*, 52 U.S.L.W. 3596 (February 21, 1984). It then concluded that the statistical studies introduced before the district court indicated that the handicapped population of Medicaid recipients would suffer proportionally more from the reduction in hospital benefits than the nonhandicapped recipients. *Id.*, 715 F.2d at 1042 & n.7.

The Sixth Circuit stated that the Medicaid program was intended to provide more than equal access to the program. Rather, the court felt that the objective of the Medicaid program was "to afford the best cure, therapy, or preventive treatment that the allotted funds can provide." 715 F.2d at 1043 n.8. Thus, although the Sixth Circuit held that "[t]he state clearly proved that it was justified in attempting to reduce its Medicaid expenses" (715 F.2d at 1043), it felt that the State's rationale was not sufficiently supported by the evidence. *Id.* at 1044. The case was remanded to the district court to give the State a chance to justify its reduction of hospital days as compared with the plaintiff's alternative, which would have limited the number of days of hospital coverage on a per stay basis.

Judge Merritt dissented from the majority panel decision. Agreeing with the district court, he argued that the "equal access" test was the only workable rule to apply to Section 504. In his view, the adverse impact standard would mean that any reduction of spending would have a disparate effect on some class of patients, thereby creating "a whole new source of challenges to state budgetary decisions." 715 F.2d at 1047. Thus, application of the adverse impact standard would mean that some class of plaintiffs would always succeed in its challenge to a budget reduction.[6] Judge Merritt stated

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[6] The dissent noted, for example, that the plaintiff's alternative solution that would limit the number of trips to the hospital would

that he did not believe that Congress intended Section 504 to authorize the federal courts to step in and control the state's budgetary process. The dissent argued, moreover, that inasmuch as the majority opinion would require a "form of affirmative action or equality of results," it was at odds with the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). There, the Court held that Section 504 does not compel federal funds recipients to undertake affirmative action favoring the handicapped.

## SUMMARY OF ARGUMENT

Adoption of the adverse impact standard would be at odds with the statutory language and purpose of Section 504 of the Rehabilitation Act. Section 504 establishes its own criteria for determining whether or not its provisions have been violated. It prohibits a federal funds recipient from excluding or discriminating against an "otherwise qualified handicapped individual" "solely by reason of his handicap." Thus, the statutory language puts in issue the qualifications of the handicapped individual and the motive or intent of the recipient of federal funds. By contrast, the adverse impact standard, developed under Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), does not require a showing of an intent to discriminate or an evaluation of the qualifications of individual members of protected groups.

Moreover, there are substantial differences between discrimination on the basis of race or sex (the groups protected by Titles VI, VII and IX) and discrimination against the handicapped. Unlike race or sex, a physical

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fall hardest on the class of patients who must come often to the hospital for short stays. Thus, in his view, there appeared to be "no way under the majority's opinion that a state can modify its medical program without some disparate impact on some class of patients—unless the state simply abolished Medicare altogether, a solution that would presumably be equal only because it denies relief to everyone." 715 F.2d at 1049-50.

or mental handicap may affect one's ability to function and, in appropriate circumstances, may provide legitimate grounds for exclusion of the handicapped individuals. *Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979). To be realistic, Congress recognized that the existence of a handicap often defines the extent to which a disabled person may participate in particular employment opportunities. For these reasons, Congress drafted Section 504 to require an analysis of a specific individuals' qualifications. It did not allow a violation to be premised on the basis of group effects.

Because of the imprecise and complex nature of handicap discrimination, the adverse impact model would be inappropriate. The decision below presents the real danger that its logic could be extended to find discrimination merely because of the absence of individuals with a specific handicap in an organization's workforce. Unlike race and sex, the definition of handicap is not susceptible to precise categorization. There is no readily identifiable and homogeneous class of handicapped persons, and there likewise is no fixed reference class with which treatment of the handicapped could be compared. Given the difficulties in matching the qualifications of broad groups of handicapped persons with the requirements of different jobs, it would be impossible to deal with handicap discrimination issues on any basis except the qualifications of individuals for particular jobs.

In addition, the adverse impact approach requires adequate statistical information about the qualifications of the minority and female workforce in the relevant labor market, which then is compared to the racial or sexual makeup of a particular employer's workforce. There is no adequate available source of workforce information about the availability of qualified handicapped persons. Also, because the number of handicapped persons with a particular handicap would be so small in relation to the overall workforce, such statistics as could be mustered would have little legal significance or predictive value.

As long as qualified handicapped individuals are given the same opportunities as persons who are not handicapped, there can be no violation of Section 504. Section 504 does not require a preference for handicapped individuals beyond equal access and it would be improper for the courts to read Section 504 in the broader manner of the Sixth Circuit below. *Southeastern Comm. College v. Davis, supra.*[7]

## ARGUMENT

### I. SECTION 504'S BAN ON DISCRIMINATION AGAINST QUALIFIED INDIVIDUALS SOLELY ON THE BASIS OF HANDICAP CANNOT BE CONSTRUED TO ENCOMPASS THE ADVERSE IMPACT THEORY OF DISCRIMINATION.

#### A. Section 504's Language Excludes Enforcement by Use of the Adverse Impact Theory.

Section 504 establishes its own criteria for determining whether or not its provisions have been violated. An examination of the statute's language indicates that the focus is on the individual handicapped person, rather than on the impact on groups of the handicapped. Section 504 provides in pertinent part that:

> No *otherwise qualified* handicapped *individual* in the United States, as defined in section 706(6) of this title, shall *solely by reason of his handicap*, be excluded from the participation in, be deneid the

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[7] There are other related reasons why the adverse impact model should not be applied generally to Section 504, particularly in the private employment sector. Unlike the instant case where the parties agreed that the definition "handicapped individual" would be equated with Medicaid recipients who were blind or disabled (715 F.2d at 1039 n.2), many Section 504 cases involve a dispute over whether a particular individual is indeed handicapped. Moreover, often it would not be readily apparent that the employer's employment practices could be shown to cause an adverse impact on the handicapped. As detailed more fully below, the definitional difficulties in determining handicapped issues are unsuited for the adverse impact model.

> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . .

29 U.S.C. § 794 (emphasis added).

Accordingly, as the first analytical step, the individual must show that he was *qualified* to perform his job *in spite of* his handicap. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Thus:

> [I]n the more typical suit under § 504, the defendant acknowledges reliance on the plaintiff's handicap and since the plaintiff's handicap may be a permissible factor to be taken into account in determining whether he is qualified, the order of presentation of proof in such cases cannot be framed in terms of permissible versus impermissible factors. The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants.

*Doe v. New York University*, 666 F.2d 761, 777 (2d Cir. 1981). *See also Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372, 1385 (10th Cir. 1981). Accordingly, under Section 504, a "case by case analysis of the appropriate burden of proof is required due to the varying factual situations presented in each individual case." *Norcross v. Sneed*, 33 FEP Cases 679, 686 (W.D. Ark. 1983).

As a second step in Section 504 cases, the individual plaintiff must show that his discriminatory treatment was "solely by reason of his handicap." This emphasis on the institution's motivation requires a showing that the employer or institution *intentionally* discriminated on the basis of the handicapped condition. As now shown, both steps foreclose the use of the disparate impact theory of discrimination developed under Title VII of the Civil Rights Act of 1964.

Unlike Section 504, under the adverse impact theory it is not necessary to prove that the employer discriminated against an individual "because of" his race, sex, national origin or religion. Rather, the adverse or disparate impact method of proof under Title VII is used to attack employment selection criteria that are facially neutral or "fair in form," yet fall more harshly on a protected class of employees. *Int'l Bro. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). In order to establish a prima facie case of disparate impact, a plaintiff must show that a particular facially neutral employment practice produces a significant adverse impact on a protected group of employees. The employer's intent to discriminate against a class of employees is not at issue. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). In further contrast to Section 504, which relates specifically to the qualifications of the individual, under the adverse impact theory "[t]here is no requirement . . . that a statistical showing of adverse impact must always be based on analysis of the characteristics of actual applicants." *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977).

Thus, the analysis required to find a violation of Section 504 differs from the disparate impact approach in three crucial ways. First, Section 504 by its terms does not apply to neutral practices but instead addresses practices that discriminate "solely on the basis of" handicap. Second, Section 504 requires an inquiry into the qualifications of individual persons—a requirement that is not necessary under the disparate impact theory to establish a prima facie case. Third, Section 504 requires a showing of a discriminatory motive, i.e., discrimination "by reason of . . . handicap" (29 U.S.C. § 794)—a requirement absent from the adverse impact theory.

Accordingly, Section 504 is more analogous to the disparate treatment theory of Title VII. Under the disparate treatment theory of discrimination, the plaintiff

must demonstrate a discriminatory motive or intent on the part of the employer. *See, e.g., Int'l Bro. of Teamsters v. United States*, 431 U.S. at 335-36, which held that a disparate treatment case under Title VII is based upon a showing that a person is treated less favorably "*because of* such individual's race, color, religion, sex, or national origin." Like the words "by reason of" in Section 504, the words "because of" indicate that "proof of discriminatory *motive* is crucial." 431 U.S. at 335-36 n.15 (emphasis added).

As this Court has stated, the disparate treatment approach requires the following showing to demonstrate a prima facie case of intentional discrimination:

> (i) that [the individual] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Section 504's requirements are closely analogous because they stress the individual's qualifications and the motive for the institution's actions. Indeed, Section 504 is more demanding than the traditional disparate treatment standard because it permits the employer to consider the individual's handicap in determining whether the individual is qualified. *See Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979).

Thus, application of Section 504's handicap discrimination provision requires a recognition of its unique requirements not present in other statutory schemes. The courts which have closely examined Section 504 have recognized these special factors. As stated by the Second Circuit:

> A § 504 action frequently does not lend itself easily to the analysis used for allocation of burdens and order of proof used in suits alleging discrimination

> on impermissible factors (race, color, religion, sex or national origin) in violation of Title VII. . . .

*Doe v. New York University*, 666 F.2d at 776. In addition:

> The Title VI and Title IX models were not automatically adaptable to the problem of discrimination against the handicapped, but involved a very different analytical undertaking. Indeed, attempting to fit the problem of discrimination against the handicapped into the model remedy for race discrimination is akin to fitting a square peg into a round hole. . . .

*Garrity v. Gallen*, 522 F. Supp. 171, 206 (D.N.H. 1981). For all these reasons, it is clear from the language of Section 504 that the adverse impact approach would be inappropriate as a burden of proof scheme.[8]

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[8] Although Section 504 has been described as "the first Federal Civil rights law protecting the rights of handicapped persons" (42 Fed. Reg. 22,676 (1977) (remarks of then HEW Secretary Joseph Califano), it would be incorrect to assume that there is an exact correlation between the concept of handicap discrimination and discrimination on the basis of race, national origin or sex. As has been argued:

> This comparison is accurate in one sense, yet misleading in another. To the extent that discrimination on the basis of handicap, race, and national origin may often result from misconceptions and stereotypes, it is accurate to compare handicap to race and national origin. Such a comparison is misleading, however, because it serves to obscure a very important distinction. Unlike race or national origin, a physical or mental handicap may affect one's ability to function and may sometimes constitute legitimate grounds for exclusion. Distinctions drawn on the basis of handicap, as opposed to those drawn on the basis of race or national origin, do not always reflect stereotyped attitudes about disadvantaged individuals since, realistically speaking, a handicap has practical limitations that define the extent to which a disabled individual may participate in normal societal activities.

Cohen, *Discrimination on the Basis of Handicap: The Status of Section 504 of the Rehabilitation Act of 1973*, 65 Iowa L. Rev. 446, 453 (1980).

### B. Rejection of an Effects Test Would Not Be Inconsistent With This Court's Title VI *Guardians* Decision.

Insofar as Section 504 may be affected by decisions under Title VI of the Civil Rights Act of 1964, it is clear that Title VI would not require an application of the effects test in the instant case. The Court has noted previously that Section 504 was patterned after Title VI of the Civil Rights Act of 1964. *See Community Television of Southern California v. Gottfried*, 103 S. Ct. 885, 892 (1983); and *Consolidated Rail Corporation v. Darrone*, 104 S. Ct. 1248, 1250 (1984). Moreover, in 1978, the Rehabilitation Act was amended to add a new Section 505 (29 U.S.C. § 794(a)(a)(2)) which applies to Section 504 the remedies, procedures and rights available under Title VI. This Court recently reviewed the standard required to prove a violation of Title VI. Seven members of the Court "agree[d] that a violation of the statute itself requires proof of discriminatory intent." *Guardians Ass'n v. Civil Service Commission of the City of New York*, 103 S. Ct. 3221, 3235 n.1 (1983) (opinion of Justice Powell).

In *Guardians*, Justices Brennan, Marshall, Blackmun and Stevens, however, would hold that proof of discriminatory effect suffices to establish liability "only when the suit is brought to enforce the regulations rather than the statute itself." 103 S. Ct. at 3235 n.1 (opinion of Justice Powell). That view may be limited to Title VI and should not be applied to the Section 504 regulations in this case. The regulations make clear that Section 504 is to be construed as requiring merely equal access to benefits and services available to handicapped individuals. 84 C.F.R. § 84.4(b)(2) provides that:

> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but

> must afford handicapped persons *equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the person's needs. (Emphasis added)

*See also Southeastern Community College v. Davis*, 442 U.S. at 410 (Section 504 merely requires equal treatment, not affirmative action). And as the dissent and district court pointed out below, where equal treatment has been afforded the handicapped, it could not reasonably be argued that such practices "have the *effect* of subjecting qualified handicapped persons to discrimination on the basis of handicap." See 84 C.F.R. § 84.4(b)(4) (emphasis added).

Indeed, if these regulations were construed as adopting an effects test, they would be inconsistent with 84 C.F.R. § 84.4(b)(2) and with the specific language of Section 504 and hence unenforceable. *See University of Texas v. Camenisch*, 451 U.S. 390, 399 (1981) (opinion of Chief Justice Burger) ("The Secretary has no authority to rewrite the statutory scheme by means of regulations."); and *Garrity v. Gallen*, 522 F. Supp. 171, 208 (D.N.H. 1981).

Finally, this Court is not required to defer to any administrative interpretation of Section 504 that adopts an effects test. The history of Section 504's regulations contrasts sharply with the Title VI regulations, which were contemporaneous with the enactment of Title VI and were consistently applied. See 103 S. Ct. at 3240 (opinion of Justice Marshall). As this Court previously noted, the Department's reluctant and inconsistent history with respect to Section 504's regulations "substantially diminishes the deference to be given to [HHS's] present interpretation of the statute." *Southeastern Community College v. Davis*, 442 U.S. at 412-13 n. 11. For all these reasons, it is evident that rejection of an effects test in this case would be consistent with the language of

Section 504 and with this Court's previous interpretations of Title VI.[9]

## II. BECAUSE OF THE IMPRECISE AND COMPLEX NATURE OF THE CONCEPT OF "HANDICAP DISCRIMINATION," THE ADVERSE IMPACT MODEL OF ANALYSIS WOULD NOT BE APPROPRIATE.

Although Congress chose to use the term "discrimination" in both Section 504 and Title VII, Congress showed its caution by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap. There are sound reasons for this distinction.

Handicaps are not susceptible to precise categorization because they are not the same in kind and do not necessarily have the same effect on employment opportunity as do the types of discrimination prohibited by Title VII. Title VII is premised, in part, on the concept that no inherent differences exist between the general public and persons protected on the basis of race, color, religion, sex, or national origin. The courts have recognized this difference between the handicap discrimination statutes and other nondiscrimination statutes.

> First, unlike classifications based on race, there are no readily apparent divisions among the handicapped. Rather, mental and physical handicaps cover a continuum, from color-blindness or forgetfulness on the one hand to total spasticity or profound mental retardation on the other. In relation to other human beings, we are all handicapped to a certain degree, however insignificant or debilitating that handicap may be.
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[9] Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*) also was patterned after Title VI. It has been held that a violation of Title IX requires an intentional discriminatory act and disparate impact alone is not sufficient to establish a violation. See Cannon v. The University of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981).

> Assessing the capability of various individuals to perform without knowledge of the particular task under consideration and its various requirements, or without an individualized determination of their strengths and weaknesses would appear to be impossible. In fact, it was partly in recognition of this fact that Congress passed § 504—to encourage treatment of the handicapped on the basis of individualized assessment of ability. . . .

*Garrity v. Gallen*, 522 F. Supp. at 206.

Handicaps differ widely in kind and degree and there is no readily identifiable and homogeneous class of handicapped persons. The Rehabilitation Act's definition of handicapped is so broad that discrimination can only be defined in terms of disparate treatment of differently and uniquely handicapped individuals.[10] Thus, there is no fixed reference class with which treatment of the handicapped can be compared because each handicapped person must be treated differently in order to be afforded equal access to employment. Indeed, identical treatment may, in fact, constitute discrimination. For example,

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[10] Applicable Department of Health and Human Services regulations define "handicapped persons" as follows:

> "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such an impairment.
>
> (2) As used in paragraph (j)(1) of this section, the phrase:
>
> (1) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovasular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

45 C.F.R. § 84.3(j).

epileptics may be properly excluded from some jobs but not others. The nature and the degree of epilepsy may affect whether epileptics are qualified for various jobs. It, therefore, would be difficult to classify all epileptics as a member of a common class with typical claims.[11] As stated by the Tenth Circuit in an analogous context in a case interpreting 42 U.S.C. § 1985(3):

> It is apparent that different individuals are handicapped in vastly different ways, for different periods of time, and to very different degrees or extent. The variations in each category are infinite and as a consequence the term "handicapped" does not have a definition capable of a reasonably precise application for the purposes before us [i.e., defining a class of handicapped persons].

*Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3687 (1984).

Similarly, unlike race, color, national origin, or sex discrimination—which are addressed in Title VI, Title

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[11] As one commentator has noted, administrative enforcement of handicap discrimination laws is much more difficult than enforcement of laws prohibiting discrimination against females or minorities:

> In contrast, review of an employer's treatment of epileptics, for example, will not provide the same insights about how to treat other handicapped persons or, indeed other epileptics. Nor will EEOC or any other enforcing agency be able to offer guidance with the specificity it has provided in administration of Title VII in its present form. The task would require a staff with medical expertise concerning each type of impairment which gives rise to disability, and vocational expertise concerning the significance of the impairments upon the whole range of employment opportunities.

Peck, *Employment Problems of the Handicapped: Would Title VII Remedies be Appropriate and Effective?*, 16 U. Mich. J.L. Ref. 343, 370 (1983). The author concluded: "Even the disparate impact test developed under Title VII may not be well suited for dealing with the range of problems that will be encountered in providing and expanding job opportunities for the handicapped." *Id.*, at 346.

VII and Title IX—"handicapped discrimination" is not susceptible to precise categorization. It is different in kind and does not necessarily have the same effect on equal opportunity as with other forms of discrimination. Former HEW Secretary Matthews explained the unique definitional problems in a letter accompanying the publication of the initial proposed Section 504 regulations of HEW:

> Section 504, however, differs conceptually from both title VI of the Civil Rights Act of 1964 and IX of the Education Amendments of 1972. The premise of both title VI and IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.

41 Fed. Reg. at 20296 (1976).[12]

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[12] Similar concerns were expressed by Joseph A. Califano, Jr., then Secretary of Health, Education and Welfare, in his background explanation to the 1977 HEW regulations on Section 504. Secretary Califano explained:

> From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered,

The difficulties in applying Title VII standards and concepts of discrimination were also recognized by the United States Commission on Civil Rights (herein "the Commission"). The Commission has cautioned:

> [B]ecause the classification "handicap" differs from other antidiscrimination classifications, such as race, sex, national origin, age and religion, there are significant limits to applying established civil rights law to discrimination based on handicap. . . . [T]his chapter counsels against mechanically incorporating in handicap discrimination law the antidiscrimination concepts and standards developed in other civil rights contexts.[18]

The Commission went on to discuss the differences between the groups protected by Section 504 and Title VII:

> All too often, racial and ethnic minorities, women, religious minorities, and elderly people are stereotyped, although each group is comprised of diverse and unique individuals. Nonetheless, the members of each group share one characteristic—race, national origin, being female, age, or membership in a religion. Because the handicap category lumps together all those who do not fit into the "normal" category, membership does not require even a single common characteristic. It is the difference from any of the vast number of physical and mental characteristics considered normal that defines membership in the

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make the task of prescribing general rules of nondiscriminatory treatment a difficult one.

42 Fed. Reg. 22677, May 4, 1977.

[18] United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, Clearinghouse Publication 81, September 1983 at p. 142 (herein "Civil Rights Commission Study"). Although the Commission views the HHS Section 504 regulations as establishing an effects test (Study at 5, 52, 122, 130), it also noted the disagreement and inconsistencies in court decisions relating to that issue (*Id.*, at 150).

> handicap class. As a result, handicapped people are an exceedingly heterogenous group.[14]
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> • • • •
>
> Because race, sex, and national origin have no direct connection with functional abilities, this neutrality doctrine [of Title VII] prohibits consideration of these characteristics except in the remedial context of affirmative action.
>
> The handicap classification, in contrast, encompasses real functional limitations. The goal of handicap antidiscrimination law, therefore, cannot be complete neutrality or indifference to the defining characteristic.[15]

It thus is apparent that the substantial differences between traditional protected groups and the handicapped make it inappropriate to apply the concept of adverse impact discrimination to suits brought under Section 504 of the Act.

## III. THE INSUFFICIENT AND IMPRECISE NATURE OF AVAILABLE STATISTICAL DATA RELATING TO THE HANDICAPPED MAKES THE USE OF A *GRIGGS*-TYPE ADVERSE IMPACT ANALYSIS INAPPROPRIATE IN CASES ARISING UNDER SECTION 504.

Even under Title VII, in which the adverse impact approach has been adopted, the courts have emphasized that not all statistics are probative of discrimination. In *Teamsters*, the Supreme Court cautioned that "statistics are not irrefutable; they come in infinite variety and like any other kind of evidence they can be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances." 431 U.S. at 340. In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Court developed the proper form of statistical analy-

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[14] Civil Rights Commission Study at 145-46.

[15] Civil Rights Commission Study at 153.

sis in Title VII cases. The usefulness of statistics, it said, depends upon the identification of the appropriate comparative data base, *i.e.*, the relevant labor market to which the employer's workforce is to be compared.

*Hazelwood* makes clear that, at a minimum, for statistics to be probative there needs to be a comparison between the composition of the relevant components of the employer workforce and the composition of those persons available in the relevant labor market with the skills to perform the employer's jobs. Unless workforce statistics and the qualified labor pool are tailored to each other and appropriately refined, no inference of discrimination is reasonable or permissible, because any resulting disparity may be caused by numerous factors other than discrimination. The Supreme Court has observed, in this regard, that broad-based statistics which include a substantial number of people who realistically cannot be considered potential applicants are "virtually irrelevant" for comparison purposes. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 586 (1979); *Hazelwood*, 443 U.S. at 308 n.13; *Int'l Bro. of Teamsters*, 431 U.S. at 340-41 n.20. Accordingly, if the available statistics reveal little about the class of "otherwise qualified" handicapped individuals, they may not be relied upon to demonstrate the presence of discrimination. *New York City Transit Authority v. Beazer*, 440 U.S. at 585 & n.29 ("[E]vidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants undermines the significance of such figures.") As now shown, these principles make inappropriate the use of adverse impact theory in handicap discrimination cases.

In contrast to the typical employment discrimination case based upon race or sex where a comparative analysis between the percentage of minorities or women in the employer's work force and the qualified outside relevant labor market might be probative of discrimination, there

simply is no way to obtain sufficient statistical information upon which to base a prima facie case of adverse impact discrimination against the handicapped.[16]

The first problem is that there is no adequate source or sources of statistical information on the availability of qualified handicapped persons. As the United States Commission on Civil Rights has concluded:

> There is no single repository of adequate national data on the handicapped population. Instead, demographic information must be culled from four distinct sources: service eligibility statistics, service delivery statistics, population surveys, and ad hoc studies. Each of these types of data has deficiencies. Service eligibility and delivery statistics are limited to those people who seek specific services from certain agencies; the data collection lacks breadth and standardization, and the records are often duplicative or incomplete. Existing population surveys have a variety of problems. Some ask general questions on activity restrictions but yield no accurate or detailed disability information. Others are rich in diagnostic information but tend to exaggerate the rate of disability or fail to provide adequate information about functional limitations or activity restrictions. Other surveys report major restrictions but do not indicate their causes. Ad hoc studies tend to be sharply focused examinations of local or State conditions. Because these limited studies are not designed to

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[16] In the instant case, there appears to be common agreement between the parties that handicapped individuals include only blind and disabled persons. There also seems to be agreement as to the portion of eligible Medicaid recipients who were to be considered handicapped. This situation is atypical of the usual Section 504 case in which the statistical evidence would be disputed as to the availability and qualifications of handicapped individuals. As has been observed, "it may be extremely difficult to produce any useful comparative data regarding the potential applicant pool [of handicapped individuals] either within the local area or the Standard Metropolitan Statistical Area (SMSA)." Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DePaul L. Rev. 953, 972 (1978) (herein "Gittler").

> take national samples, it is not possible to extrapolate from them to the national population.
>
> The available statistics are difficult to aggregate because of inconsistent methodologies and definitions used by the different sources of data.

Civil Rights Commission Study at 10-11 (footnotes omitted).[17]

The Civil Rights Commission pointed out the differences between the use of statistics in traditional civil rights cases (such as race discrimination) and in handicap discrimination cases:

> To date, statistics have been used infrequently with respect to handicap discrimination. Few court decisions have viewed statistical evidence as proving disparate impact or suggesting intentional discrimination. It would seem the absence of handicapped participants in a program or activity with many nonhandicapped participants might be evidence of discrimination. The total absence of people commonly considered handicapped from a large employer's workforce, for example, is statistically so unlikely as to suggest discrimination. *Given the connection between handicaps and functional limitations, however, disproportionate underrepresentation of people with a particular type of handicap does not necessarily indicate unlawful discrimination.*

Civil Rights Commission Study at 157 (emphasis added).[18]

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[17] The Civil Rights Commission also pointed out that the different usages of the terms "handicap" and "disability" in the Social Security Act (42 U.S.C. § 423(d)) and the Rehabilitation Act "hamper any correlation of the statistics generated by the various programs, since the samples are divergent by definition." Civil Rights Commission Study at 11 n.42. The Commission also noted that there are "major differences in the methodologies used to collect data" by federal agencies that collect such data—the Social Security Administration, the National Center for Health Statistics and the Bureau of Census. Civil Rights Commission Study at 11.

[18] As pointed out in Prewitt v. United States Postal Service, 662 F.2d 292, 307 (5th Cir. 1981):

In addition, it has been argued that "meaningful statistics cannot be obtained for the handicapped because of the virtual absence of handicapped persons in the labor market relative to the number of persons employed." Gittler, 27 DePaul L. Rev. at 971. Because of this small proportion of the handicapped in the working population,

> the data will always show that few if any handicapped are currently employed by the defendant employer compared to the number of handicapped persons in the overall population. The obvious effect is that any statistics introduced in support of a handicapped individual's charge would not be significantly probative of the issue of discrimination. Otherwise, if the statistics were given the same weight for handicapped persons as they are for blacks or women, the handicapped plaintiff would always prevail.

*Id.*, at 972.[19] Gittler also points out that "even if disparities could be shown between the employment statistics of the employer and the relevant labor market pool,

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> One difference . . . is that, when assessing the disparate impact of a facially-neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because "the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.

Thus, it has been concluded that:

> it is apparent that definitional problems will complicate enforcement of a statutory prohibition of discrimination against the handicapped to a far greater degree than they have with enforcement of a prohibition of discrimination on the basis of race, sex, or national origins.

Peck, 16 U. Mich. J.L. Ref. at 357

[19] A similar deficiency in the adverse effects test was pointed out by the dissent below. Judge Merritt observed that "the disparate impact test will always work for some class of illness; it will always produce a finding of discrimination." Jennings v. Alexander, 715 F.2d at 1049.

such statistical analyses would be so small as to have little legal significance or predictive value." *Id.*, at 973.[20]

For all these reasons, it is apparent that there is not an adequate statistical basis upon which to apply the adverse impact approach to the general run of Rehabilitation Act cases. Thus, Congress had good reasons for limiting the protections of the Rehabilitation Act to the individual who could demonstrate that he was qualified for a particular job in spite of his particular form of handicap.

## IV. THE SIXTH CIRCUIT IMPROPERLY OVERRODE THE LEGITIMATE BUDGETARY DECISION OF THE STATE GOVERNMENT BECAUSE BY PROVIDING EQUAL ACCESS TO HOSPITAL BENEFITS, THE STATE HAS COMPLIED WITH THE REQUIREMENTS OF SECTION 504

EEAC's final concern is that the lower court's decision would permit the courts to second-guess the legitimate budget decisions of governments who must administer the Medicaid program in the face of dwindling revenues. As argued by the dissent below:

> Without a clear, bright-line distinction based on access, like the District Court makes, the Court's decision will create a whole new source of challenges to state budgetary decisions. People with physical ail-

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[20] *See also* Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines*, 27 DePaul L. Rev. 989, 1001, 1008 (1978), which noted with respect to an analysis of employee selection criteria that "in many instances the criterion-related validity study favored by the EEOC Guidelines will be impractical, if not impossible to apply to the handicap context due to a lack of a significant number of handicapped test takers in the sample." This conclusion would also apply to the HHS regulations at issue here. See 45 C.F.R. § 84.13. Lang also concluded that the traditional Title VII method of statistical proof might not be readily transferable to handicap cases because "the number of handicapped applicants may not be a large enough base for a traditional statistical study." *Id.*, at 1007.

> ments depend on a myriad of state services more heavily than do people with no ailments. When a local government decides to reduce the quality, frequency or financing for some service, for example, bus service, some group could make a case of discrimination, for example, by showing that they use the buses more than others. Across-the-board cuts in welfare, social security, education and many other benefits will affect some groups more than others and will open the way to litigation. I do not believe that Congress intended this statute to authorize the federal courts to step in and control the state budgetary process when cuts in appropriations affect asthmatics, or some other class of patients, somewhat more heavily than another group of patients. 715 F.2d at 1047.

The decision below goes far beyond any other in permitting the courts to set aside the legitimate budgetary decisions of state governments. Thus, the decision would lay the groundwork for an interpretation of nondiscrimination statutes that is too openended. As stated by the Second Circuit in an analogous context:

> If, for example, a court were to assess alternative ways of saving funds throughout the administration of a city or even throughout the administration of the health care function, it would seriously risk substituting its own judgment for that of the city's elected officials and appointed specialists. We are skeptical of the capacity and appropriateness of courts to conduct such broad inquiries concerning alternative ways to carry out municipal functions. Once a court is drawn into such a complex inquiry, it will inevitably be assessing the wisdom of competing political and economic alternatives. Moreover, such policy choices would be made without broad public participation and without sufficient assurance that the alternative selected will ultimately provide more of a benefit to the minority population.

*Bryan v. Koch*, 627 F.2d 612, 619 (2d Cir. 1980) (Title VI did not prevent the closing of a hospital for budgetary reasons).

This court's recent decisions have stressed repeatedly that judicial scrutiny of state budget decisions should give great leeway to the decisions of local administrators. For example, *Board of Education v. Rowley*, 102 S. Ct. 3034, 3043 (1981), held that the Education for all Handicapped Children Act (20 U.S.C. § 1041 *et seq.*) was not intended to "guarantee any particular level of education" or "produce any particular outcome."[21] The Court cautioned that "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" 102 S. Ct. at 3052, citing *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973).[22] Thus, the Court has discouraged the imposition of obligations on federal funds recipients that go beyond those set forth in the language of the statute. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. at 24-25. *See also Southeastern Comm. College v. Davis*, which held that Section 504 on its face shows that Congress did not intend to impose an affirmative action requirement on federal funds recipients.

The decided cases have made clear that Section 504 was not intended to provide equal *results* to all classifications of handicapped individuals. Congress provided that "if the handicapped are given *access* to medical care

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[21] The Court further stated that the statute "generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunity provided other children.'" 102 S. Ct. at 3046.

[22] See also Beal v. Doe, 432 U.S. 438, 444-45 (1977) (States have broad discretion in determining the amount of medical assistance and it was not unreasonable for the state to exclude nontherapeutic abortions from Medicaid); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 24-25 (1981) (Court would not assume that Congress intended to impose massive financial obligations on the States). *See also* Furnco Const. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

equal to that afforded the general population, no discrimination will be found." *NAACP v. Wilmington Medical Center, Inc.*, 491 F. Supp. 290, 318 (D. Del. 1980), *aff'd*, 657 F.2d 1322 (3d Cir. 1981) (emphasis added). *See also Doe v. Coalutti*, 592 F.2d 704, 707-10 (3d Cir. 1979) (Congress conferred broad discretion on the States in determining Medicaid assistance. Section 504 was not violated by denial of hospitalization in private psychiatric institutions beyond 60 days); *Doe v. Devine*, 545 F. Supp. 576, 585 (D.D.C. 1982), *aff'd*, 703 F.2d 1319 (D.C. Cir. 1983) (Mental health cutback does not violate Section 504 since program "will restore physically and mentally ill persons to relative equivalency in terms of actual resource expenditures. Thus, there can be no genuine contention that the cutbacks at issue 'discriminate' against mentally diseased persons solely by virtue of their handicaps."); and *Bernard B. v. Blue Cross & Blue Shield*, 528 F. Supp. 125, 132-33 (S.D.N.Y. 1981), *aff'd*, 679 F.2d 7 (2d Cir. 1982) (Exclusion of psychiatric inpatient care did not constitute discrimination solely because of handicap.)

In light of the above cases, it cannot be seriously argued that Section 504 is violated by providing equal hospital services to all categories of persons in need of hospitalization. Such equal treatment can in no way be considered discrimination solely on the basis of handicap. To read Section 504 in the manner of the Sixth Circuit would impose obligations on local governments that finds no support in the statutory language or its legislative history. Moreover, to do so would mean that once local governments have established a certain level of funding for programs affecting the handicapped they never can be reduced because of the inevitable impact on some group of handicapped individuals. Without clear indication from Congress, these additional burdens cannot be placed upon the recipients of federal funds.

## CONCLUSION

For all the reasons set forth above, the Court should vacate the decision of the Sixth Circuit below and hold that the State did not violate Section 504 when it reduced the number of reimbursed hospital days in the same amount for all eligible Medicaid recipients.

Respectfully submitted,

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